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No. 06-1084

IN THE

Supreme Court of the United States

TODD RONGSTAD, AND THE VALKYRIE GROUP, LLC
Petitioners,

v.

JULIE M. LASSA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant who fails to avail himself of state civil procedure, and whose statements are found to be capable of defamatory meaning, may nevertheless refuse to disclose the identity of individuals involved in defaming the plaintiff.

2. Whether review of a state court's interpretation of law is warranted where the petitioner seeks certiorari on an interpretation that was not argued to the courts below and that would not change the outcome under the facts of the case.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Introduction.

This case concerns a garden variety failure of a litigant to exercise his state statutory and procedural rights on a timely basis. Those failures were expressly identified and correctly applied by the Wisconsin Supreme Court. This case is not about the Wisconsin Supreme Court's failure to recognize a constitutional issue or failure to apply appropriate constitutional principles. Any grant of certiorari relative to this case, Respondent respectfully submits, would be improvident.

Defamatory Postcard.

On January 16, 2003, plaintiff Julie Lassa, then a state assemblyperson, filed a civil action alleging the intentional

tort of defamation under Wisconsin law.[1] Resp't App. 1a-2a.[2] The claim arose from an oversized postcard that untruthfully charged Lassa with illegal, dishonorable, unethical, and unprofessional conduct, and tied her to a state senate leader who had recently been indicted on felony charges for extortion. The mailer conveyed to its readers that Lassa was engaged in felonious activity.

The postcard was mailed out just before the 2002 state assembly elections; yet, it referred to Lassa's candidacy for state senate, not assembly, and was mailed to constituents in the senate district. While Lassa was not a candidate for senate at the time the postcard was mailed, it was widely predicted that the state senate seat she now holds would become vacant.

The complaint named defendants Todd Rongstad and his consulting firm, the Valkyrie Group, LLC (hereinafter collectively referred to as "Rongstad"), and "Does, 1-5,"[3] persons whose identities Lassa did not then know but believed were likely involved in the production, mailing, and financing of the postcard.

Lassa brought suit for the legitimate purpose of clearing her name in the eyes of her constituents as a state assemblyperson and a potential candidate for state senate, and to recover damages, after being subjected to defamatory attacks by Todd Rongstad and the Alliance for a Working Wisconsin ("AWW"). To prosecute her defamation claims, Lassa, a public figure, was required to prove actual malice.

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[1] For purposes of Respondent's opposition brief to the petition for certiorari, Lassa assumes that the Court will treat this postcard as defamatory as this issue is not raised in the petition.

[2] The Respondent's appendix contains a color copy of the mailer.

[3] Wisconsin law allows naming of unknown defendants by fictitious name.

To prove the state of mind element, she needed to discover who was involved in the production and distribution of the mailer since proving state of mind begins with determining whose mind is at issue. Rongstad was the only known source of that information.

The Nature of the Alliance for a Working Wisconsin

During his depositions between February 3 and March 11, 2003, Rongstad testified that he was the president and founder of the Valkyrie Group. Rongstad also claimed to be the president and CEO of the AWW, which he said was an issue advocacy organization. Rongstad admitted to producing the Lassa attack postcard on behalf of the AWW.

Yet, his testimony regarding the nature of the AWW was inconsistent. Rongstad admitted that he discussed the Lassa matter with a couple of "members" of the AWW (Resp't App. 5a, 6a), while also claiming that he did not discuss it with anyone (Resp't App. 8a-10a). He testified that the AWW had more than ten members (Resp't App. 4a), but the articles of incorporation of AWW stated that it "shall have no members" (Resp't App. 13a-16a). Rongstad testified that no dues were required for membership and that there were no specific criteria for becoming a member. Resp't App. 3a-4a, 11a-12a. In fact, Rongstad testified that "supporters of the organization are often considered as members of the organization." Resp't App. 12a. According to Rongstad, it was simply up to him, as the president of the organization, to determine who was a "member." Resp't App. 4a, 12a, 15a-16a.

Despite the inconsistent testimony regarding membership, Rongstad testified that people with whom he discussed the Lassa mailer were all "members," and refused to answer whether or not any one else was involved because it would identify the AWW members. In other words, by asserting that everyone else involved with the mailer was a "member,"

Rongstad attempted to shield the unnamed defendants from disclosure.

Rongstad also refused to say who contributed money that paid for the production and distribution of the postcard. Throughout his depositions, Rongstad tried to take sole responsibility for targeting Lassa, and yet he ultimately admitted receiving at least one contribution to the AWW during the three months leading up to the Lassa mailing. The source of that money was later revealed as Lassa's state senate primary race opponent, Alex Paul, though the money was contributed through another individual.

Proceedings and Disposition in the State Courts

A. Initial Discovery Order

On January 22, 2003, Lassa's attorneys served Rongstad with a notice of deposition for January 30, 2003. Rongstad moved the trial court for an order postponing the deposition based on inconvenience, a claim of "absolute immunity," and a claim that the lawsuit was filed for the illegitimate purpose of allowing plaintiff to determine whether to run for state senate. Resp't App. 18a; Pet. App. 111a. The trial court granted Rongstad's request to postpone the deposition until February 3, 2003, as a matter of convenience; the court denied Rongstad's other claims. Resp't App. 18a-21a.

The deposition was held on February 3, 2003. During the deposition, Rongstad refused to answer proper deposition questions regarding the identities of those who supported the Lassa postcard campaign. Lassa immediately moved to compel and the deposition was halted for a telephone hearing on Lassa's motion. Also at the hearing on February 3rd, Rongstad's counsel argued that disclosing the identities of those who supported the Lassa mailer would violate the First and Fourteenth Amendments, and provided the trial court with a list of case law he believed supported Rongstad's claim of

privilege.[4] Rongstad's counsel requested to brief the issue; however, he proffered no evidentiary support for a privilege claim, nor did he even notify the court that he intended to provide any. While the court declined Rongstad's request to provide further argument through briefing, the trial judge informed the parties that he would consult the cases cited and rule on the asserted constitutional privilege the following morning.

The trial court reconvened the next morning and allowed Rongstad to present further argument and to proffer evidence. Resp't App. 23a-25a. Applying cases cited by Rongstad's counsel, the court weighed the interests of Rongstad and AWW members in concealing membership information against the interests of Lassa in clearing her name and discovering who was involved in the mailer, as well as the public's interest in preventing libel during an election cycle. Pet. App. 81a-85a (applying *NAACP v. Alabama*, 357 U.S. 449 (1958); *Buckley v. Valeo*, 424 U.S. 1 (1976); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)). The trial court found that there were no less intrusive measures that would allow Lassa to redress her defamation claim against the unknown defendants. Therefore, the trial court ordered Rongstad to "answer all questions inquiring as to the names and behavior of any other persons involved in the preparation, funding or distribution of the mailing." Pet. App. 13a.

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[4] Rongstad's counsel listed these cases in the following order: *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Torgerson v. Journal/ Sentinel, Inc.*, 563 N.W.2d 472 (Wis. 1997); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721 (Wis. 1999); *McIntyre v. Bd. of Elections*, 514 U.S. 334 (1995); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Gitlow v. N.Y.*, 268 U.S. 652 (1925); *Wis. Socialist Workers v. E. Michael McCann*, 433 F. Supp. 540 (E.D. Wis. 1977).

At the same hearing, Rongstad moved for a stay to seek a supervisory writ from the Wisconsin Court of Appeals, the state's intermediate appellate court. In denying the stay, the trial court found very little likelihood of success in the petition for a supervisory writ. Furthermore, the court considered the harm to the plaintiff in further delay due to the upcoming special election for state senate.[5]

Following the motion hearing on February 4, 2003, the Rongstad deposition continued. Rongstad again refused to respond to questions about AWW, asserting the same argument rejected by the court earlier that day.

B. Request for Stay to the Wisconsin Court of Appeals

Also on February 4, 2003, Rongstad moved the court of appeals for a supervisory writ to stay the order of the trial court and requested leave to appeal the interlocutory order.[6] Finding no misuse of discretion by the trial court, the court of appeals denied the request for a stay that same day. However, Rongstad continued to refuse to answer questions regarding persons involved in the planning, preparation, and funding of the Lassa postcard.

C. Motion for Reconsideration Hearing

On February 5, 2003, Rongstad filed a motion in the trial court to reconsider the court's February 4th order. The motion for reconsideration was heard on February 6, 2003. For the reconsideration hearing, Rongstad produced an affidavit

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[5] On the date of the discovery hearing, the court noted that the special election had not yet been scheduled but that the senate seat was vacant. The governor later called the primary for April 1, 2003, and the special election for April 29, 2003.

[6] Rongstad's motion was captioned as a petition for supervisory writ; however, Rongstad's counsel informed the Court that the motion should be treated as a request for a stay.

containing conclusory assertions that he would not disclose members' names[7] due to the alleged members' "fear of public reprisal and potential legal actions" and because disclosure would "likely ruin [his] business and force him to find a new career." Resp't App. 27a. The affidavit was the only evidence presented by Rongstad in all of the trial court proceedings that his "members" feared negative effects from public disclosure of their association with AWW.

Citing *NAACP v. Alabama* and *Buckley v. Valeo*, the trial court found that, while "the quantum of proof" needed "ought to be set pretty low," Rongstad's "conclusory allegations and references to fear of a lawsuit [were] simply so low that they [did] not satisfy the *Buckley* requisite factual showing." Pet. App. 94a-95a. The court ordered Rongstad to appear at a continued deposition on February 11, 2003.

At the continuation of Rongstad's deposition, Rongstad contradicted his affidavit by stating that, in fact, *no* members contacted him about this lawsuit. Resp't App. 29a. Moreover, Rongstad testified that the sole basis for his claim that he had "guaranteed confidentiality with respect to the identity of his members" (Resp't App. 27a) was a statement on an AWW brochure that claimed to offer AWW supporters confidentiality and that, according to Rongstad, "anyone who contributed to the organization would have seen" (Resp't App. 28a). In other words, Rongstad refuted his February 5th affidavit, in which he testified that he had discussed this lawsuit with AWW "members," that they expressed fear of public reprisal, and that they were concerned because he had allegedly guaranteed that their identities would remain confidential.

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[7] Inconsistently, Rongstad's counsel also argued at the hearing that Rongstad had *already* complied with the discovery orders.

D. Lassa's Motion to Find Rongstad in Contempt

On February 21, 2003, Lassa moved the trial court to find Mr. Rongstad in contempt of the court's discovery orders, and to impose sanctions for his repeated failures to produce properly requested discovery. On February 28, 2003, the court heard argument on the motion for discovery sanctions, including the sanction of finding Rongstad in contempt of the court's orders. Rongstad, by his counsel, again asserted the same constitutional privilege. Again finding that Rongstad failed to support his assertion of privilege, the trial court ordered Rongstad to appear at a continued deposition on March 3, 2003, to address the questions of who supported AWW as it related to the Lassa mailer. Rather than leaving the contribution amount and dates open-ended, the court ordered Rongstad specifically to identify those who contributed more than $100 to AWW in 2002. The court set a continued hearing on the contempt sanction for March 11, 2003.

On March 3, 2003, the deposition continued. Rongstad's counsel restated the same constitutional privilege and Rongstad refused to answer questions as directed by the circuit court's orders of February 4, 6, 11, and 28, 2003.

On March 11, 2003, the contempt hearing continued. This time, Rongstad did not dispute that he failed to comply with the court's discovery orders. Finding Rongstad in contempt, the trial court sanctioned Rongstad under Wisconsin's discovery statutes. Additionally, the trial court stated that it would entertain a motion for default judgment if, by April 4, 2003, Rongstad did not comply with the discovery orders.

E. Rongstad's Failure to Pursue Appellate Review

On March 4, 2003, the Wisconsin Court of Appeals denied Rongstad's petition for interlocutory review of the trial court's February 4, 2003, discovery order, "[b]ecause it appear[ed] that Rongstad no longer wishes to seek interlocutory review of the circuit court's order." Resp't App.

30a-31a. Rongstad had let the time run for filing argument on the merits of the petition for leave and, thus, the petition was denied.

On April 1, 2003, the Wisconsin Court of Appeals denied Rongstad's second petition for review of the trial court's February 28 and March 11, 2003 orders, because the court of appeals does not take permissive appeals from oral orders. Resp't App. 32a-33a. When the sanctions orders were reduced to written order on April 2, 2003, Rongstad failed to seek an appeal.

Also on April 1, 2003, the court of appeals dismissed Rongstad's petitions for supervisory writ regarding the trial court's February 28 and March 11, 2003, orders, and found that "Rongstad has not shown that the circuit court has a duty to vacate its orders."[8] Resp't App. 34a-35a.

F. Denial of the Motion to Dismiss

After the trial court issued its initial discovery orders on February 11, 2003, Rongstad filed a motion to dismiss Lassa's complaint on the grounds that Lassa had failed to state a claim upon which relief can be granted. This was Rongstad's first motion attacking the pleadings and their sufficiency to state a claim. On February 13, 2003, the court set a briefing schedule for the motion to dismiss with reply briefs due by March 28, 2003. Rongstad did not object to this schedule and did not request an accelerated briefing schedule. The hearing on Rongstad's motion to dismiss was then delayed by a stay pending the disposition of Rongstad's

[8] Petitioners erroneously state that "Rongstad promptly filed with the Supreme Court of Wisconsin a petition for leave to appeal the court's contempt and sanctions order and petition for supervisory writ . . . ." Pet. at 7 n.3.

insurance coverage. Here again, Rongstad failed to object to the stay on his motion to dismiss. Resp't App. 37a-39a.

The stay was lifted on June 26, 2003, and on July 8, 2003, the trial court held a hearing on Rongstad's motion to dismiss. In denying Rongstad's motion to dismiss, the court found that:

> Reading words and viewing the picture of the mailer in the plain and ordinary sense, I do reach the conclusion that there is language capable of defamatory meaning.
>
> The mailer conveys the impression that Lassa is Senator Chvala's lackey, basically, and implies that she has also engaged or is about to engage in the same kind of allegedly unlawful and unethical conduct that Senator Chvala was accused of. . . .

R. 151:4.[9] In short, the court found that Lassa had pled a valid claim and that the mailer was, in fact, capable of defamatory meaning.

G. Final Sanctions Rulings

After the court found the postcard capable of defamatory meaning, on August 15, 2003, the trial court ruled on two pending motions: Rongstad's motion for relief from the sanctions and Lassa's motion to enter a default judgment. Rongstad reargued the same constitutional privilege as grounds for relief from sanctions. The court ruled that Rongstad continued to be in contempt of the trial court's two written orders and denied Rongstad's motion for relief from sanctions. R. 152: 28. At the same hearing, the trial court granted Lassa's motion for default judgment as a further

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[9] The citation to the record from the Wisconsin Supreme Court is referred to as "R. [document number]:[page number]."

sanction for refusing to comply with the discovery orders.[10] R. 152:46.

H. Final Disposition of the Case through Settlement

The trial court's final order, entered on November 17, 2003, approved a settlement agreement drafted by the parties dismissing the defamation cause of action with prejudice, keeping intact the monetary sanctions, but permitting appeal.[11]

I. Review by the Highest Court of the State

On July 13, 2006, the Wisconsin Supreme Court issued its decision on the appeal of this matter, finding:

(A) In defamation cases, circuit courts should ordinarily decide a pending motion to dismiss for failure to state a claim before sanctioning a party for refusing to disclose information that would identify otherwise-anonymous members of an organization. Under the circumstances here, however, the circuit court did not erroneously exercise its discretion in compelling discovery and imposing sanctions before deciding Rongstad's motion to dismiss.[12]

(B) The circuit court properly rejected Rongstad's assertion of privilege under the balancing test of the NAACP line of cases because Rongstad failed to

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[10] Petitioners mistakenly assert that the default judgment was issued because Rongstad failed "to provide sufficient details about the contributors of the Alliance." Pet. at 7. The default judgment was granted as further sanction for not complying with the court's discovery orders that would allow Lassa to discover who was responsible for the attack postcard. R. 152:43-46.

[11] Rongstad appealed to the Wisconsin Court of Appeals; however, the case was certified directly to the Wisconsin Supreme Court, the highest court of the state.

[12] Majority opinion of the Wisconsin Supreme Court.

> make the required preliminary factual showing to support his assertion.[13]

Pet. App. 3a, ¶ 5 (*Lassa v. Rongstad*, 718 N.W.2d 673 (Wis. 2006)) (footnotes added).[14]

On a motion for reconsideration to the Wisconsin Supreme Court, Rongstad reargued his claim that the lower court should have heard his motion to dismiss before ordering disclosure of those involved with the mailer, and argued *for the first time* that the trial court applied the wrong standard under *NAACP v. Alabama* and *Buckley v. Valeo*. The Wisconsin Supreme Court denied the motion for reconsideration without analysis or comment.

REASONS FOR DENYING THE PETITION

I. ASSERTIONS RELATED TO THE TIMING OF THE MOTION TO DISMISS MISREPRESENT THE RECORD AND THE PROCEDURAL REQUIREMENTS UNDER WISCONSIN LAW.

A. Rongstad acquiesced to the order of the proceedings in the trial court and made no constitutional objection based on timing of the motion to dismiss.

As is evident in the extensive trial court record, Rongstad failed to raise a question of whether the sufficiency of the pleadings had to be tested as a constitutional matter before the court ordered disclosure of those who targeted Lassa. Yet, in his petition, Rongstad argues that the Wisconsin Supreme Court erred by finding that he waived his objection to the timing of the hearing on the motion to dismiss. According to Rongstad, the trial court should have known that he was

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[13] Lead opinion of the Wisconsin Supreme Court.

[14] Hereinafter references to the opinion below are only to the Petitioners' Appendix.

arguing on constitutional grounds that the court must rule on his motion to dismiss before any discovery could be compelled, even though 1) Rongstad did not file a motion to dismiss until after the first two discovery orders were issued, and 2) he never made a request to the trial court to stay discovery once his motion was filed. Rongstad disingenuously refers to "the motion to dismiss" as if it had been filed before the trial court issued its discovery orders. *See* Pet. at 28. Despite Rongstad's allusions to the contrary, there was no pending motion to dismiss, nor any other challenge to the sufficiency of the facts to support defamation, when the orders compelling discovery were issued.

In an attempt to bolster the record, Rongstad characterizes the arguments that he made during the protective order hearing on January 29, 2003, (the first dispute heard by the trial court in this case) as if he argued that a motion to dismiss should be addressed before discovery proceed to protect his members' constitutional right to speak anonymously. He made no such argument. On January 29th, Rongstad asked the trial court for a protective order primarily on the basis that the deposition time was inconvenient to him.[15] While Rongstad's counsel stated that he *intended* to file a motion to dismiss for failure to state a claim, *it was not filed at the time*.

Under Rongstad's most recent iteration of the facts, he claims to have raised a constitutional privilege under *New York Times v. Sullivan*, 376 U.S. 254 (1964). In fact, counsel provided no grounds for such a motion, other than asserting a vague and unsupported "defense of absolute immunity" and an unsupported belief that the lawsuit was for "political motivation." Rongstad's *only* argument related to a constitu-

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[15] For example, Rongstad stated in his brief in support of the protective order that "Defendants do not request that the discovery sought not go forward at a more appropriate time." R:5:3.

tional privilege in his motion for protective order was as follows:

> There are principles of *absolute immunity* that are applicable in a defamation suit involving a public official. The Court is probably familiar with the case of *Sullivan v. The New York Times* [sic]. There are issues of advocacy that come into play, and *we intend to file* a motion to dismiss the entire lawsuit within a week to 10 days.

Resp't App. 24a (emphasis added). The trial court correctly interpreted *Sullivan*—the sole case cited by Rongstad—as providing no "absolute immunity" from suit as asserted by Rongstad. Resp't App. 19a-20a; *see also Sullivan*, 376 U.S. at 282-83 (holding that a public official must demonstrate actual malice in a defamation suit, but not banning such a suit altogether). Thus, the trial court correctly found that Rongstad presented an erroneous principle of law and did not order a stay. *See* Pet. App. 17a-18a, ¶ 43.

Giving Rongstad the benefit of the doubt, the trial court invited Rongstad to file a motion to dismiss and to show circumstances supporting a stay of discovery until the motion had been decided, but added that as of January 29th, "[n]o showing has been made that this is such a case." Resp't App. 19a. Rongstad declined the court's invitation.[16] Instead, he delayed filing a motion to dismiss until February 11, 2003, *after* the trial court issued its discovery orders and after

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[16] Petitioners misstate the record by claiming that the trial court "had already rejected Rongstad's claim of constitutional privilege and made it clear that it would not stay discovery pending a decision on his motion to dismiss"; and therefore it would have been "fruitless" to object further. Pet. at 19. To the contrary, the trial court refused to give an advisory opinion, noted that there was no pending motion, and invited counsel for Rongstad to file his motion to dismiss and take up the issue of a stay at that time. No motion to stay was ever filed based upon a pending motion to dismiss.

the court of appeals denied his request for a stay and for interlocutory review of those discovery orders.[17] Rongstad did not request a stay or expedited review based on his motion to dismiss, nor did he take any other action to ask the trial court to address his motion to dismiss before additional discovery matters were addressed.[18] At best, "[i]t was not until April 30, 2003, that Rongstad first apprised the [trial] court of the argument that he now advances, that the court was required to decide his motion to dismiss before compelling discovery." Pet. App. 22a, ¶ 56.[19] By that time, the trial court had already issued its discovery orders and imposed discovery sanctions. *Id.*

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[17] Petitioners again misstate the record below by asserting that Rongstad raised the issue of the timing of hearing the motion to dismiss on constitutional grounds to the court of appeals. Pet. at 5 n.2. Counsel for Rongstad only asked for a stay on the grounds that the trial court abused its power when it issued the February 4th discovery order. He did not ask the court to address the question of the timing of the motion to dismiss. In fact, when he filed his request for stay to the court of appeals, there was no pending motion to dismiss. The court of appeals denied the request for stay on February 4, 2003.

[18] Petitioners imply that the trial court was asked to set a different briefing schedule. Pet. at 6 ("The court refused to schedule the motion for a prompt hearing . . ."). There was never a request for a different briefing schedule, even when the court stayed the case on the merits pending a resolution of defendants' insurance coverage, which included a stay of the then-pending motion to dismiss.

[19] April 30, 2003, was the first time any issue related to hearing the motion to dismiss was raised. As the supreme court related:

> On that date, Rongstad filed a letter with the court in which he requested that it address his motion to dismiss before resolving any other pending motions because this would "eliminate the need for any further action." In our view, however, even this April 30 letter did not apprise the circuit court of the argument Rongstad now makes.

Pet. App. 22a, ¶ 56 (quoting Rongstad's April 30th letter).

Moreover, contrary to Rongstad's suggestion, the trial court determined that the mailer was capable of defamatory meaning prior to addressing Rongstad's motion for relief from sanctions and Lassa's motion for default judgment as a further sanction. In other words, sanctions were not finally assessed until after the court made the finding that the complaint stated a claim for defamation.

The state supreme court reviewed, in detail, the facts in the record related to the process given the motion to dismiss. Pet. App. 21a-24a, ¶¶ 54-58. Rongstad points to nothing that indicates a single error that would warrant this Court's review of the state court's findings.

As the court below found:

> In short, Rongstad did not raise his argument that the circuit court was required to address his motion to dismiss before it compelled discovery until after the court imposed discovery sanctions. Moreover, the argument that the constitutional dimension of the parties' discovery dispute mandated this course of action was a relatively novel one considering existing law at the time. Given all of the circumstances, the court did not erroneously exercise its discretion in compelling discovery and imposing some sanctions without first deciding Rongstad's motion.

Pet. App. 23a-24a, ¶ 58 (footnotes omitted). Thus, the Wisconsin Supreme Court did not find that Rongstad failed to "specifically" argue that his motion to dismiss must be heard before the discovery dispute was resolved as Rongstad contends. Rather, the court found that Rongstad failed to timely raise *any* argument that would allow the lower court to understand the basis for his claim of privilege that he artic-

ulated for the first time on appeal to the Wisconsin Supreme Court.[20]

B. The Wisconsin Supreme Court's holding is consistent with *Doe v. Cahill.*

Rongstad asserts that this Court should review this fact-specific case because the Wisconsin Supreme Court's opinion is not consistent with the Delaware Supreme Court's opinion in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) and other states' cases that require a defamation claim to be tested before requiring disclosure of anonymous defendants. Rongstad's claim indicates a lack of understanding of the pleading

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[20] The majority below took strong issue with the dissent's attempt to recreate the record as urged here by Rongstad:

> The dissent imparts a spin to both the facts and the law. Contrary to what it first insinuates over the course of nine paragraphs . . ., and then expressly concludes based on several more paragraphs of nuanced explanation, . . . there is no real indication in the record of Rongstad's argument until April 30, 2003, at the earliest. By suggesting otherwise, the dissent elevates the "silk purse from a sow's ear" aphorism to new levels. The dissent apparently thinks that if it underlines the words "motion to dismiss" enough times, it can summon facts from the record that do not exist. . . .
>
> Likewise, none of the legal authorities that the dissent cites (or that Rongstad cited in the circuit court) would have apprised the circuit court that Rongstad was arguing the court must address his motion to dismiss before imposing discovery and contempt sanctions. Those authorities do not address whether circuit courts should decide a pending dispositive motion in a defamation case before resolving discovery disputes. As we have indicated in the body of this opinion, *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), which was decided more than two years after the circuit court denied Rongstad's motion to dismiss, appears to be one of the few cases to address such an issue.

Pet. App. 23a, ¶ 58 n.17.

requirements for defamation under the Wisconsin Statutes.[21] The *Cahill* court held that, under Delaware procedural law, a plaintiff seeking the identities of an anonymous defendant in a defamation action must first survive summary judgment to ensure that the claim has merit before compelling the defendant to lose his anonymity. The Wisconsin court agreed with the reasoning of the Delaware court, but because the pleading requirements are different in the respective states, the court determined that a hearing on the sufficiency of the pleadings in a defamation action in Wisconsin is the equivalent of the procedure adopted by the *Cahill* court. As the Wisconsin Supreme Court explained:

> In addition, the Delaware court emphasized that one of the most important aspects of testing a defamation claim by summary judgment is that the claim must be "capable of a defamatory meaning" in order to survive summary judgment. . . . This, of course, is the same inquiry that is the focus of a motion to dismiss a claim for defamation in Wisconsin. . . .
>
> Accordingly, we determine that under Wisconsin law, requiring the circuit court to decide a motion to dismiss before compelling disclosure and imposing sanctions best addresses the concerns expressed in *Cahill*. When faced with an assertion of constitutional privilege against disclosure of information identifying otherwise-anonymous organization members, the circuit court should decide a pending motion to dismiss for failure to state a claim before sanctioning the party for refusing to disclose that information.

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[21]Unlike the notice pleading requirements generally, the Wisconsin Statutes require special pleadings for defamation cases:

> In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally.

Wis. Stat. § 802.03(6) (2003-2004).

Pet. App. 21a, ¶¶ 51-52 (citations omitted). Notably, Rongstad is now arguing for exactly what the Wisconsin Supreme Court held: a court should decide a pending challenge to the sufficiency of the pleadings in a defamation claim before sanctioning a party for failing to produce discovery that would disclose identities of anonymous members of an association. *See* Pet. at 26, n.13; *see also* Pet. App. 21a, ¶ 52. The only issue is whether Rongstad was meaningfully denied that process in this case.

The Wisconsin Supreme Court found that Rongstad was not denied that process. The court below decided to apply its ruling prospectively only because, even if the court had applied the rule retroactively to Rongstad, the result in his case would not have changed given the trial court's finding that the postcard was capable of defamatory meaning. *See Rolo v. Goers*, 497 N.W. 2d 724, 730 (Wis. 1993) (finding that prospective application is only appropriate "when the purpose of the new ruling cannot be served by retroactivity.") The Wisconsin Supreme Court's prospective rule binds the lower courts. Petitioners' concern that the prospective rule will not be adhered to by Wisconsin courts is baseless.

C. The record below does not warrant the Court's review of the trial court's procedural rulings.

Rongstad asks the Court to find that he had a right to have his motion to dismiss heard before sanctions were issued. This question is not presented by the actual proceedings below and facts in this case. The trial court found that the mailer was capable of defamatory meaning *before* it ruled on Rongstad's motion to reconsider all of the prior sanction orders and before it ruled on the motion for a default judgment. Rongstad's failure to develop the trial court record on this matter and the trial court's denial of the motion to dismiss the defamation claim thus renders this question unworthy of the Court's review. *See, e.g., Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 n.2 (1972) ("when the

issues are not presented with the clarity needed for effective adjudication, appellate review . . . is . . .inappropriate.") (citing *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947)). This is a simple case of missed opportunities. The unique facts in the instant case do not warrant further review. Rongstad could have, but did not, avail himself of procedures that would have avoided the alleged harm he now asserts.

II. RONGSTAD AGREED BELOW WITH THE CONSTITUTIONAL TEST APPLIED BY THE WISCONSIN SUPREME COURT AND THE COURT CORRECTLY FOUND THAT NO ASSOCIATIONAL RIGHTS WERE TRIGGERED.

A. Rongstad did not press the interpretation of *NAACP v. Alabama* and its progeny that he now urges and, consequently, that interpretation was not passed upon below.

In his petition, Rongstad claims that the courts below applied the wrong standard in determining whether the AWW members' associational rights were triggered. He argues that the court below should not have required any preliminary showing once he made a claim of privilege on behalf of his "members." In other words, Rongstad's petition to this Court faults the Wisconsin courts for applying the very cases that Rongstad asked them to apply.

In argument on the merits to the Wisconsin Supreme Court, Rongstad agreed that *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Buckley v. Valeo*, 424 U.S. 1 (1976), laid out the proper test for deciding his constitutional privilege. In his appellate brief on the merits to the court below, Rongstad explained the two-part test as follows: First, there must be evidence of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" that would adversely affect an organization's members. Wis. S.Ct. Appellants' Br. at 14 (quoting *NAACP*, 357 U.S. at

460-61) (internal quotations omitted). Second, *"[o]nce a prima facie showing has been made*, the party seeking disclosure must demonstrate that the information required to be disclosed is substantially related to a compelling government interest." *Id.* at 19 (emphasis added) (internal quotations and citation omitted).[22] Rongstad, Lassa, the trial court, and the supreme court all agreed that the proper test, as applied here, was 1) whether Rongstad met the required preliminary showing to trigger AWW's associational rights; and 2) if so, whether Lassa demonstrated a compelling interest in disclosure that outweighed the members' interest in anonymity.[23] The application of the two-part test was the only constitutional issue any party pressed upon any of the courts below. Because the Wisconsin courts were only asked to apply the two-part *NAACP/Buckley* test to the facts, that was the only test passed on by the state courts. In the courts below, Rongstad challenged the application of the test to the factual record he created; he did not raise issue with the legal standard itself.

After failing to convince the Wisconsin Supreme Court that the trial court misapplied the *NAACP/Buckley* test to the facts in the record, Rongstad changed his own position on the law. In his motion for reconsideration to the Wisconsin Supreme Court, Rongstad asserted the interpretation now urged in the petition for certiorari—that is, that there is no preliminary

---

[22] *See also* Wis. S.Ct. App. Br. at 13 ("Thus, *where evidence suggests* that compelled disclosure could chill political association because of fear of hostility or economic reprisal, the government must demonstrating [sic] a 'compelling' interest in obtaining the information.") (citing *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (emphasis added). Contrary to the assertion of the Petitioners, this was not the alternative argument pressed below (Pet. at 21 n.5); rather it was the *only* interpretation argued below.

[23] Only the dissent found that this is not the proper test (Pet. App. 63a, ¶ 158 (Prosser, J., dissenting)); the concurrence did not reach this issue (Pet. App. 43a, ¶ 93 (Butler, J., concurring)).

showing required—for the first time. Contradicting his own argument on appeal, Rongstad argued in his motion for reconsideration that the majority opinion below failed to follow established constitutional law by applying the two-step test and requiring him to make a preliminary showing of harm. The Wisconsin Supreme Court denied his motion for reconsideration without analysis or comment. Thus, question of whether there must be a preliminary showing was never passed upon by the state court. Rongstad's late attempt to refashion his argument after losing on appeal does not warrant this Court's review. *See Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (refusing to exercise appellate jurisdiction over constitutional claims that were not preserved pursuant state law rules of procedure). While a federal question was raised in the courts below, it was not the one that Rongstad now urges the Court to decide.

Because the question of *whether* a preliminary showing must be made under *NAACP* and its progeny was not pressed upon or passed on by the courts below, certiorari is not warranted. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) ("it is also the settled practice of this Court, in the exercise of appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below."); *see also Envtl. Defense v. Duke Energy Corp.*, 75 U.S.L.W. 4167, ___; No. 05-848, slip op. at 17 (U.S. Apr. 2, 2007) (Apr. 2, 2007) (noting issues not analyzed by court below are procedurally foreclosed).

B. The Wisconsin Supreme Court correctly applied *NAACP v. Alabama* and *Buckley v. Valeo*.

As in his motion for reconsideration, but contrary to all of his prior arguments below, Rongstad argues to this Court that

the state court applied the wrong constitutional standard by requiring him to make *some* showing that disclosure of AWW "members'" identities would potentially cause a chilling effect on their associational rights, before determining whether Lassa demonstrated a compelling governmental interest that would justify compelled disclosure of those members. He now argues, based on interpretations of *NAACP* and *Buckley* from the California Supreme Court and other federal and state courts, that no preliminary showing is required; rather, the person seeking disclosure has the first burden. *See* Pet. at 14-16.

Yet, all of the courts cited by Rongstad agree that there must be an "association" on which to attach the freedom of association protected under the First Amendment. *See Dallas v. Stanglin*, 490 U.S. 19, 23 (1989) (holding that a finding of a constitutionally protected association is a necessary precondition for applying First Amendment protection of the "compelling interest" and "least restrictive means" tests). The fact of an association is the a priori condition for a protected right of private association. The trial court record is unclear whether the AWW even has members for which to attach associational rights. The articles of incorporation of the organization state that it "shall have no members," indicating that the "association" is a sham. In fact, the more reasonable interpretation of Rongstad's testimony is that Rongstad declared all those involved with the mailer "members" only after the complaint was filed, and with the sole intent to protect his political-attack business.

Further, even if Rongstad had shown that the AWW was an actual association with members, the record does not demonstrate any reason to presume a chilling effect upon those members. As the Wisconsin Supreme Court found:

> Rongstad's affidavit is insufficient to establish the required preliminary showing under *NAACP* and its progeny. The affidavit provides no evidence of particular

> instances of past or present threats, harassment, or reprisals. *See Buckley*, 424 U.S. at 74; *NAACP*, 357 U.S. at 462. It also does not indicate a pattern of threats or specific manifestations of public hostility against the Alliance or similar groups.
>
> *Although a record of past harassment or reprisals is not always necessary, Rongstad has not otherwise established a reasonable probability of such chilling effects.* At most, he established precisely what is ordinarily deemed insufficient: a general statement of subjective fear of reprisal without any basis in objective, particularized facts. Only one of the five statements in his affidavit is directly related to the substance of the required showing, and that statement establishes only that some unspecified number of members have told him they will no longer be interested in participating in the [AWW] or other organizations like it based on general fears of reprisal.

Pet. App. 27a-28a, ¶¶ 67-68 (emphasis added) (referring to Rongstad's affidavit, reproduced as Respondent's Appendix F).

The record is devoid of any evidence of risk of harm, reprisals, or harassment. Moreover, given the conflicting evidence on whether there is an association from which to attach rights, the record does not support a presumption of a chilling effect. The proceedings below do not warrant a review of constitutional principles by the Court. *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960) (dismissing writ of certiorari as improvidently granted "in view of ambiguities in the record as to the issues sought to be tendered").

This matter has been resolved on its merits. The trial court entered a judgment, in accordance with the parties' settlement agreement, that dismissed with prejudice the defamation cause of action against Rongstad and allowed Rongstad to appeal the appropriateness of the discovery sanctions awarded against him. R. 141:2. The only constitutional issue

is intertwined with state law on discovery sanctions. Moreover, because the action is dismissed with prejudice, there will be no additional discovery and this Court's decision has no impact on the associational rights of a single AWW "member." What is left at issue for appeal is whether the stipulated amount of discovery sanctions against Rongstad was reasonable. Because no constitutional rights of those unnamed defendants are implicated or threatened, this case is not an appropriate vehicle to review any conflict in authority.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

EDWARD R. GARVEY *
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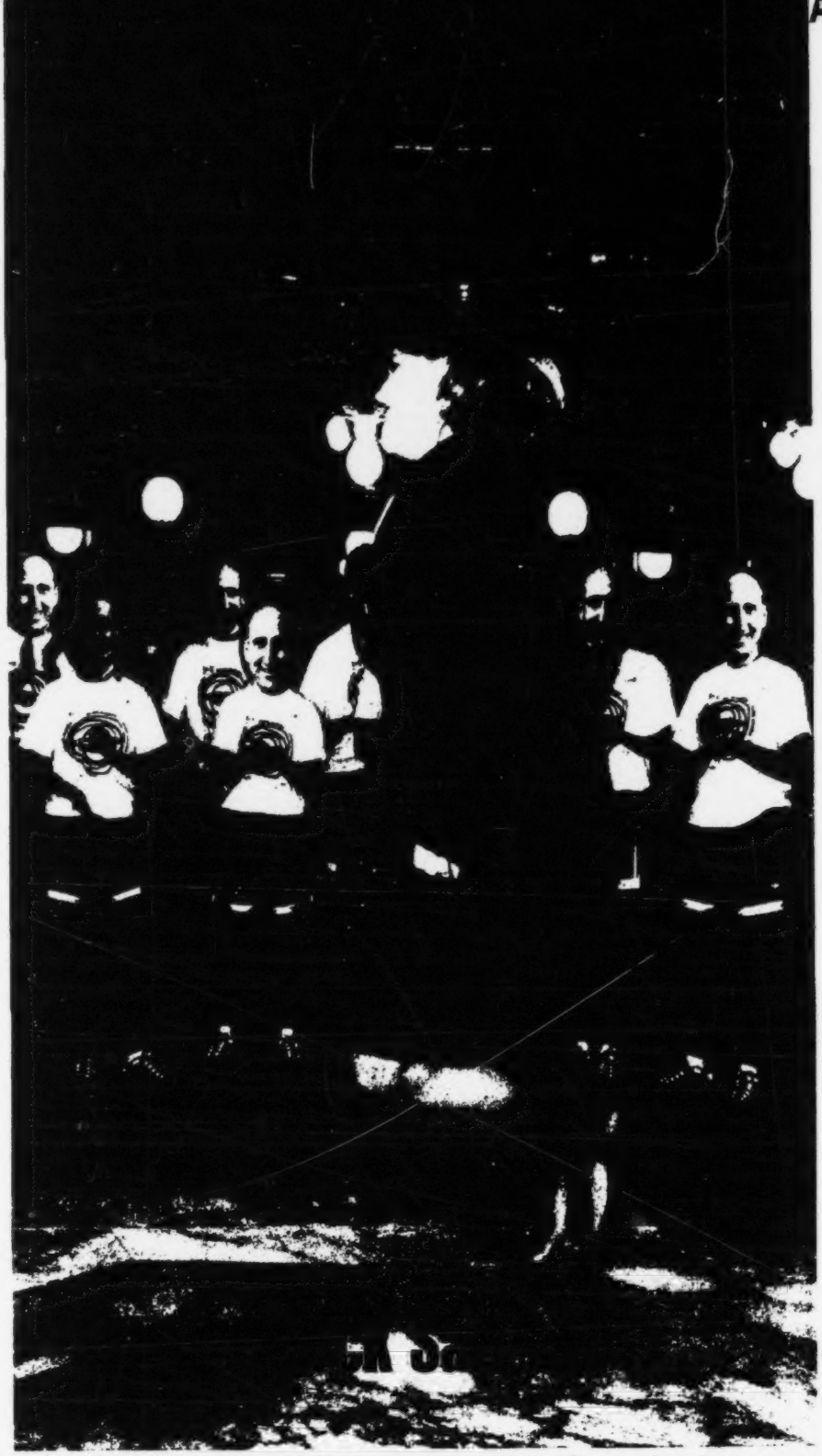
* Counsel of Record

Counsel for Respondent

April 11, 2007

APPENDIX

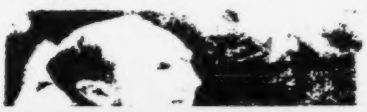
AVAILABLE
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State senator faces 20 felony counts, up to 85 years in prison

Chvala charged with extortion

Jensen, other GOP
wardsers expected
be charged today



A public service announcement from the Alliance for a Working Wisconsin

2a

APPENDIX B

STATE OF WISCONSIN
CIRCUIT COURT, DANE COUNTY

No. 03-CV-177
Volume II

JULIE M. LASSA,
Plaintiff,

v.

TODD RONGSTAD, THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC., and
DOES, 1-5, in their individual capacities,
Defendants.

DEPOSITION of TODD JAMES RONGSTAD, was taken under and pursuant to the provisions of Section 804.05 of the Wisconsin Statutes, and the acts amendatory thereof and supplementary thereto, before me, Jessica Wendorff, Registered Professional. Reporter ands Notary Public in and for the State of Wisconsin, at the law offices of Garvey & Stoddard, S.C., 634 West Main Street, Madison Wisconsin, on the 4th day of February 2003, commencing at 11:15 o'clock in the forenoon.

* * * *

[78] A Not that I'm aware.

Q And if anyone would be aware of it the founder and board—

A Like I said, I'll have to take a look at the paperwork again.

Q At this point you don't know of any?

A No.

Q And you don't have any idea how many people you have designated as a member?

A I do. I just don't want to misspeak by giving you an incorrect number.

Q Are we talking five? More than five or fewer than five?

A More than five.

Q Fewer than 10 or more than 10?

A More than 10.

Q How many roughly?

A I'd have to go back and look at that.

Q Is there a membership fee?

A No.

Q So it's just someone that—I'm just trying to understand this.

A Supporters of the organization.

Q Let's say I want to be your supporter and I say I'd like to be a supporter of the Alliance for [79] a Working Wisconsin. You say fine, you're in?

A Correct, correct.

Q So I could be a communist, a fascist, a Nazi? It doesn't matter?

A If I thought you were sincere and were a legitimate supporter of the organization. But if I didn't think you were sincere or a legitimate supporter of the organization, you wouldn't be a member.

Q You would make that decision?

A Well, we would make that decision together.

Q Suppose I disagreed, could I appeal it to someone?

A I don't think we have any provisions for that, no. It's never been an issue.

Q There are no dues at such?

A No.

Q Let's go back to the Exhibit 16. I don't know why I can never find this thing.

A Here's another.

Q Thank you. With whom did you discuss this mailer?

A A number of different individuals.

Q Let's name them.

MR CROOKS: To the extent this goes [80] to the constitutional issues raised previously, I'll object.

MR. GARVEY: But—go ahead and finish the statement. I didn't hear it.

MR. CROOKS: He can answer if he chooses.

THE WITNESS: My best recollection is that I discussed it with a few members. I discussed it with a few friends, sort of in the initial exploratory phase, research kinds of issues. And that's about the extent of it.

BY MR. GARVEY:

Q Well, who were they?

MR CROOKS: Same objection, same instruction.

THE WITNESS: The people that I talked to that aren't members that I recall and there may have been more would be Heather Smith, Lindsay Hoglund, Susie Schooff, and Scott Tyre. And I believe Mark Jefferson.

MR. GARVEY: Could you read back those names for us, please.

(Answer was read back.)

BY MR. GARVEY:

Q And you're saying these are nonmembers?

[81] A Correct.

Q Let's take Scott Tyre. Who is Scott Tyre?

A He's a lobbyist for Foley & Lardner.

Q What did you discuss with Scott Tyre?

A I don't remember specifics of any of these conversations, but I believe that I did communicate with them about the Alliance was considering doing an anticorruption communication of this kind, and I mean I can't tell you exactly what any of those conversations were.

* * * *

BY MR. GARVEY:

Q What other people did you discuss this race [95] with, this project?

A As I said, these are the nonmembers I recall. There were a couple members I discussed it with.

Q Who were they?

A I did not—that was sort of a preliminary kind of thing as I—my first step in doing anything here. I didn't discuss it with anybody else.

Q But you discussed it with two people you call "members." Who were they, and what did you discuss?

MR. CROOKS: Same objections.

THE WITNESS: They weren't involved in the production of this piece, so I am not giving you my membership list.

BY MR. GARVEY:

Q What I'm asking you for is, you've identified two people unnamed who you discussed the idea of producing or getting involved in the Lassa matter. And you won't tell us who they are.

A It didn't have anything to do with the production of this piece. That was all something that I did through the Alliance for a Working Wisconsin and had sole authority for [96] and did not discuss with anybody else.

Q Maybe we can save some time here because—who authorized you to produce this?

A I did. I'm the executive officer of Alliance for a Working Wisconsin.

Q And who paid you to do it?

A The Alliance for a Working Wisconsin.

Q Where did they get the money?

A Out of Alliance funds and contributions.

Q Who made those contributions?

MR. CROOKS: Same objection.

* * * *

THE WITNESS: Lots of different people.

BY MR. GARVEY:

Q You got this postcard, this photograph the 28th of the October?

A Uh-huh.

Q In four days this was in the hands of voters in Ms. Lassa's district?

A Yeah.

Q How much did it cost to produce this piece?

MR. CROOKS: Objection, asked and answered yesterday.

THE WITNESS: As I said yesterday, I think approximately with mailing, postage, [97] printing, all that kind of stuff, roughly around $3,500.

BY MR. GARVEY:

Q Did you get a fee in addition to that?

A The Valkyrie Group did, yes.

Q What was that fee?

A $3,000.

Q So the total was $6,500?

A I guess, yeah, that's roughly correct.

Q How much does it cost to mail each one of these?

A It's roughly 35 cents or something like that.

Q And you mailed 10,000 of them?

A As I said, roughly in that range. I don't have the exact figures for you. That's my rough estimate.

Q If I give you a list of names and ask did you discuss either the possible open seat or producing or getting involved in the Lassa project, are you going to answer that, those questions?

A Well, I've—

Q Yesterday you wouldn't, so I'm asking you today.

A I've answered every nonmember, and as I said, [98] since there's no reason, I am not going to name members that

I may have discussed this with. They were not involved in the production of this piece.

MR. GARVEY: Let's go off the record.

(Discussion off the record.)

BY MR. GARVEY:

Q Mr. Rongstad, would you identify all persons involved in the preparation, funding, or distribution of the postcard at issue and pertaining to their conduct in this regard?

MR. CROOKS: Let me just object to asked and answered. Subject to that, you can answer.

THE WITNESS: I was the sole person responsible for handling all those things. I had contractors that assisted me with printing, mail processing, and some graphic design. But I was the person responsible, not consulting with anybody else about all of those matters.

BY MR. GARVEY:

Q With whom did you discuss getting involved in the Lassa matter?

A As I said, a number of people who aren't members who I already named and a couple of [99] people who are members who I am not going to name.

Q Why aren't you going to name them?

A Because it has no relevance to this issue and what the Court's order is. I'm answering the questions. I was the one solely responsible. None of my members saw this in advance of this going out. They didn't discuss it in with me in advance of it going it. None of my members had any idea of what the subject was of the piece. I was solely responsible. My organization paid for it and I managed the whole processing of—

Q Who did see it before it went out?

A I would assume just my graphic designer and when it went to the printer and the mail house. Nobody else.

Q Did anyone make a review of the language on this?

A No.

Q How about the picture of Chuck Chvala on the second side?

A Not other than what I described to you earlier regarding the graphic designer assisting me with finishing the project.

[100] Q What I'm trying to get to is this, somehow you made a decision to get involve in the. Lassa matter, whether it was your. Assembly race or the Senate race. With whom did you discuss that question?

MR. CROOKS: Same objections.

THE WITNESS: I've already answered it.

BY MR. GARVEY:

Q Are you not going to answer it?

A I've already answered it. It was solely my decision.

Q To get involved in this race, you didn't discuss it with anyone other than those people?

A It was solely my decision to do it, yes.

Q And you funded it—

A Through my organization, the Alliance for a Working Wisconsin, yes, I did.

Q And you made the decision without checking with anyone?

A Absolutely.

Q You didn't check with your other board member?

A I didn't check with my other board member. I didn't check with my members. I made the decision myself.

[101] Q Who contributed towards this specific project?

A There have never been any earmarking of any contribution for my organization for any activity period.

Q So if I go down a list of names, did you discuss the Lassa race or the open seat, what is your testimony going to be? I think we can save ourselves some time here.

A I have told you all people that I recall discussing it with, other than a couple of members. So if you want to go through a list of names trying to identify my members, I am not going to tell you.

MR. GARVEY: Let's just take a break.

(Recess was taken.)

BY MR. GARVEY:

Q Will you identify all the people with whom you discussed the subject of this mailer before it was mailed?

MR. CROOKS: Objection, asked and answered.

THE WITNESS: Nobody other than myself. I didn't discuss the subject with anybody.

BY MR. GARVEY:

* * * *

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT, DANE COUNTY

Case No. 03-CV-177
Case Code: 30106
Volume III

JULIE M. LASSA,

Plaintiff,

v.

TODD RONGSTAD, THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC., and
DOES, 1-5, in their individual capacities,

Defendants.

DEPOSITION of TODD JAMES RONGSTAD, was taken under and pursuant to the provisions of Section 804.05 of the Wisconsin Statutes, and the acts amendatory thereof and supplementary thereto, before me, JESSICA WENDORFF, Registered Professional Reporter and Notary Public in and for the State of Wisconsin, at the law offices of Garvey & Stoddard, S.C., 634 West Main Street, Suite 101, Madison Wisconsin, on the 5th day of February 2003, commencing at 10:15 o'clock in the forenoon.

* * * *

[18] appreciated.

BY MR. GARVEY:

Q You testified that no dues are required. And you testified that you do not have a specific set up criteria for determining a member; would that be a fair statement?

A Correct. Although, as I described yesterday and will answer once again, supporters of the organization are often considered as members of the organization.

MR. CROOKS: Finish your answer, and I'll explain to you something and maybe will speed this up.

THE WITNESS: And, you know, that's the process of determining who's going to be a member is up to the officials of the organization.

MR. GARVEY: Mr. Crooks.

MR. CROOKS: Thank you. The document we brought with us today, that you admitted have not had an opportunity to review, does go into those issues, which is why we brought it.

MR. GARVEY: Well, perhaps you could be of assistance by pointing.

MR. CROOKS: I will do so. Todd, [19] maybe you can help me.

MR. GARVEY: Let me just mark this. This is a Form 1024 application for exemptions from taxes for the Alliance for a Working Wisconsin.

MR. CROOKS: Addendum D.

(Exhibit No. 40 marked for identification.)

BY MR. GARVEY:

Q Mr. Rongstad, I'm handing you what your counsel gave me as your application for tax exemption for the Alliance marked as Exhibit 40?

A That's correct.

Q Your counsel indicated Addendum D may be of some assistance to us. Would you explain what—

A It's related to sources of financial support. Sources include individuals, organization, and businesses that share

the Alliance's views and interests in the public policy issues affecting Wisconsin residents. The Alliance may also seek grants. Contributors may eventually be members of the Alliance and eventually receive newsletter communications and regular updates about organizational activities.

[20] Q. Why do you think this is responsive to the question of how your members find out about information?

A I didn't think it was.

MR. CROOKS: I thought the issue was how people go about becoming members.

BY MR. GARVEY:

Q Mr. Rongstad, is there something in the bylaws of this organization or in the filing for nonprofit status that defines membership?

A This relates to how people can be members. Supporting the organization, that's how they can become members.

Q Such as contributors—

A In addition to something else I'm looking for here.

Q Let me ask you about that. Contributors may, eventually be members?

A Correct.

Q It does not say will. It just says may.

A Correct.

Q In your articles you say there shall be no members, Article 6. How do you explain that?

A It doesn't say there shall be no members. It says there aren't at the beginning.

[21] Q Showing you the same exhibit, if you look at Article 6, no members, the corporation shall have no members?

A Yeah, that was an initial organizational.

Q Does it say this is just an initial organizational matter or—have you amended this?

A No, not officially but we have by discussion.

Q And discussion with whom?

A With the other board members.

Q So the three of you who previously have been identified—

A Correct.

Q —have done this without notifying Internal Revenue Service or no one else?

A That is correct.

Q So that the internal inconsistency here has been rectified?

MR. CROOKS: Well, let me object as argumentative. Subject to the objection, you can answer.

THE WITNESS: What was the question?

MR. CROOKS: Do you want to just read it back?

(Question was read back.)

[22] THE WITNESS: I'm looking for something else as well.

BY MR. GARVEY:

Q Do you have a document that shows it has been?

A No, that was through one of our verbal meetings.

Q When did that take place?

A I can't give you the exact date, early on in the organization.

Q Can you give me the year?

A I believe 2000.

Q And then how did you, when you cleared this up, define member?

MR. CROOKS: I'll object just to the extent it's been asked and answered. Subject to that, you can answer.

(Discussion off the record.)

BY MR. GARVEY:

Q You said you have clarified and changed the bylaws so now you permit members. Did you adopt the definition in Addendum D that your counsel pointed to?

A No. If you could just give me a second, I'm looking for something else relative to your earlier question. Page 2 of Part I, Item 8 [23] says, The board of directors hereby gives the president the power to conduct, manage, direct—

MR. CROOKS: Go slow so the reporter can get it.

MR. GARVEY: I can't find this. Can you help me out?

MR. CROOKS: Page 2, Part 1, Item 8.

THE WITNESS: Page 2.

MR. CROOKS: Article 4, second paragraph, The board of directors hereby gives the president the power to conduct, manage, direct, and control the affairs of the corporation, to negotiate and enter into contracts, and do all necessary acts and things necessary or expedient in carrying out the purposes of the corporation.

BY MR. GARVEY:

Q Could you tell us why—

A Those responsibilities in connection to the additional language on page 2—well, on Part 2, Item 1, page 2, Future contemplated activities include: Direct communication via Internet, e-mail, establishing local groups of volunteers to further the Alliance's message.

[24] Q We're actually trying to get this down. Slow down. Could you now tell me which paragraph you're starting to read?

A First paragraph starting with future. Future contemplating activities include: Direct communication via Internet, e-mail, establishing local groups of volunteers to further the Alliance's message, possible memberships, Internet website, and sponsoring public debates. The possible memberships is something that I, as the president of the organization, in consultation with the other board members, went ahead with.

Q Let me just ask you this question. Have you established direct communication by Internet and e-mail with people you call members?

A Yes.

Q And do you have those available?

A I am not going to give you communications that have the names of my members.

Q Have you established local groups of volunteers?

A No.

Q No. 3, possible memberships, that could be memberships in other organizations or it could [25] be members?

A No, this relates to the Alliance for a Working Wisconsin.

Q Did you draft this document?

A No.

Q Who did?

A My attorney.

Q Who's your attorney?

A Jeff Bartzen.

Q And so it's your testimony that possible memberships does not mean memberships in other organizations?

A That's correct.

Q It means there might be members despite the statement that there will be no members?

A No, it means that's one of the things that we're, you know, planning for the future of the organization.

Q Is there an Internet website for the organization?

A We have one reserved. It hasn't been put up yet, but we have the address reserved.

Q Have you sponsored public debates?

A Yes.

Q And where and when?

* * * *

APPENDIX D

STATE OF WISCONSIN
CIRCUIT COURT, DANE COUNTY
Branch 13

Case No. 03-CV-177

JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD, THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC. and
DOES 1-5, In Their Individual Capacities,

Defendants.

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 29th day of January, 2003, commencing at 11:30 o'clock a.m.

PRESIDING:

HONORABLE MICHAEL N. NOWAKOWSKI
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendant Todd Rongstad, The Valkyrie Group and Does 1-5.

* * * *

[3] discovery and get my client in a deposition setting so that he can ask him questions that are somehow going to be determinative of whether his client runs for State Senate, that's not a legitimate purpose for filing a lawsuit.

There are principles of absolute immunity that are applicable in a defamation suit involving a public official. The Court is probably familiar with the case of S*ullivan v. The New York Times*. There are also issues of advocacy that come into play, and we intend to file a motion to dismiss the entire lawsuit within a week to 10 days.

And to subject him to the deposition process under the guise of a legitimate lawsuit is not right, number one. Number two, I'm not available and he's not available, so those are the bases for the motion, and the rest of it is set forth in the pleadings and the papers that have been filed with the Court.

THE COURT: Mr. Garvey?

MR. GARVEY: Your Honor, this suit was filed on the 16th of January. The defendant was quoted in the papers the next day on the 17th with respect to the suit. We diligently tried to serve him. We finally did on the 22nd.

Mr. Crooks suggests a number of things, but he

* * * *

[7] doing so on the basis of conflicts, one would assume that you would bring your calendar along so that we'd be able to determine what the dates are when there are not conflicts.

MR. CROOKS: Judge, if I may speak to that, I originally had thought this was by telephone and was going to have Mr. Rongstad on the line, so I rushed over here at the last minute, didn't grab my calendar and don't have Mr. Rongstad,

obviously, on the line because nobody appeared by phone. But I would be happy to sit down with counsel when I leave here and pick a mutually convenient date.

THE COURT: Well, you're asking me today to quash a subpoena for a specific date, and what I'm' willing to do is only this. I will quash that on the condition that you by the end of the day today provide an alternative date Friday, August—I'm sorry, Friday, January 31st for this deposition to go forward.

If you or your client cannot come up with a better date on the 31st than the date it's presently scheduled, then it will simply proceed on the 30th, and your client and yourself will have to make the necessary accommodations to be available at that time. I would have hoped we could have come up with [8] the specific date right now, but obviously that's not going to be possible.

I will make this point with respect to some of the contentions that you've raised. There is no basis under the law to say that simply because someone has only recently been served and represents that they intend to file a motion to dismiss the case that they are therefore immune from or not subject to having their deposition taken. That simply is not a principle of law that applies.

Now, there may be extenuating circumstances. There may be a situation where subjecting somebody to a deposition in fact involves the kind of burden and inconvenience and oppression that would justify a stay to allow the motion to dismiss to be decided and then allow the deposition to go forward, if in fact the case is going to go forward. No showing has been made that this is such a case.

The other thing that is apparent from the pleadings and the rather sparse information that's in the file is that there are other defendants who have not been served, have not been named and have only been identified as Does that Mr. Garvey

and his client are entitled to try and find out who they are so as to properly join them and; in turn, allow their [9] circumstances to be considered ultimately in this lawsuit and in the questions of immunity that you allude to. So maybe the exception to the immunity provided under the *Sullivan* case might be applicable to your client, maybe not. But it wouldn't be applicable perhaps, and the facts may reveal that it wouldn't be applicable to some of these other people.

While your client is properly joined, is under the jurisdiction of the court, there's no reason why he should not answer questions at a deposition that would allow Mr. Garvey to identify who these other defendants are. He's operating under a statutory obligation to join them within a certain period of time, and I haven't been given any good reason why there should be any delay in that.

Finally, I read Mr. Garvey's letter in which he alludes to the political nature of the case, and obviously, what this is all about as the Complaint reveals is a mailing that was done in the context of a political campaign, but I don't read the letter as suggesting that Mr. Garvey and his client have filed the lawsuit solely for political reasons or solely as a basis to try to do something that will allow his client to make a decision about whether she's going to run for this Senate seat.

[10] I think he alludes to the fact that she's considering running for a Senate seat, which I think since the letter was written now is clearly an open seat since I think the incumbent's appointment to a different position was confirmed yesterday. I take judicial notice of that from the newspapers. But I don't see it necessarily as a case that involves an improper motive that would suggest that there simply is no merit to it.

For all of those reasons and for the reason that Ms. Lassa has also requested ultimately injunctive relief in this case which is aimed at clearing her name, clearing her name is a

quite legitimate purpose of a defamation case and that seems explicitly to be one of the purposes that she's seeking to accomplish by virtue of this litigation, and further delay to the extent she chooses to run for this seat will exacerbate the impact, whatever it may be, of the mailing that apparently or allegedly was generated from your client.

So for all of those reasons, I simply am not persuaded that there's any reason to delay, certainly not to delay as was suggested until a motion to dismiss was filed and briefed and decided. And as a practical matter now, there's no information that I [11] have that would suggest a reason to delay beyond giving you the consideration of rescheduling this to a better date on Friday, or better time on Friday than is presently set for it, or perhaps a better time on Thursday. I don't know how long your trip to Mauston is going to take, and maybe you can schedule this late in the afternoon on Thursday and that may be able to accommodate everybody's schedule.

So the motion will be granted in that conditional fashion, and we'll simply leave it for you folks to come up with an alternative time, if that's possible, on Friday. If it's not, then it will go forward on the time it's presently scheduled, but I do want to emphasize to Mr. Garvey that any time that Mr. Crooks and his client can offer to be available on Friday would be considered an acceptable time, so I'm not giving you the ability to veto. If they say, "Well, we could be there at 8 o'clock in the morning on Friday," and you say, "Well, I don't like to get to the office till 10:00," that's not going to work.

* * * *

APPENDIX E

STATE OF WISCONSIN
CIRCUIT COURT, DANE COUNTY
Branch 13

Case No. 03-CV-177

JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD, THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC. and
DOES 1-5, In Their Individual Capacities,

Defendants.

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 4th day of February, 2003, commencing at 9:30 o'clock a.m.

PRESIDING:

HONORABLE MICHAEL N. NOWAKOWSKI
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY, GLENN M. STODDARD and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared telephonically on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared telephonically on behalf of the de-

fendants Todd Rongstad, The Valkyrie Group and Does 1-5;

ERIC M. McLEOD, Michael Best & Friedrich, LLP, Attorneys at Law, One South Pinckney Street, Madison, Wisconsin, appeared telephonically on behalf of the defendant A.M. Mailing Service, Inc.

* * * *

[16] discover who was involved. And as we don't care who members are, we care who was involved in ordering this, paying for it, mailing it, designing it and all the rest of it.

THE COURT: All right. The request for a stay to permit appeal or to permit a petition for supervisory writ will be denied.

The defendant Mr. Rongstad has made no showing of any likelihood of success. It appears to me after consulting the very cases that he cites, that those cases stand for propositions that are contrary to the basis for the objection that was lodged to these questions.

The suggestion that he and his counsel have been denied the opportunity to make presentation on the two issues that were alluded to by Mr. Crooks is simply unfair, is an unfair characterization of what transpired between last evening when I was unexpectedly confronted with this issue and this moment.

Mr. Crooks obviously had at his disposal a series of cases, which he concedes he had consulted prior to the deposition. As a result, he was as familiar or should have been as familiar with the standards that the Supreme Court has laid out for [17] when the constitutional principles identified in cases such as *NAACP v Alabama* could be utilized to prevent what is otherwise a perfectly relevant and legitimate question at a deposition or any of the things that were at issue in those Supreme Court cases. No argument was made to suggest anything about harm or threats, or reprisals or chilling effect

of the disclosure or what the disclosure would have on Mr. Rongstad or on his cohorts or other members of his organization.

Indeed, we were not in a setting in which evidence was being taken and where I was making an evidentiary ruling, and Mr. Crooks and his client should not be slighted for failing to have presented evidence, but there was no assertion made. There was no argument made that anything of the sort identified as the kind of harm or threat that would implicate these constitutional principles was at stake here or was something that reasonably could have been shown if an evidentiary proceeding were to have been conducted.

Instead, what I was asked is to submit a brief, not to submit affidavits but to submit a brief. And the fact that I declined the invitation to receive briefs was in part a reflection of the fact that Mr. [18] Rongstad was going to be there this morning. It struck me that it would be valuable to try to, if it was possible, resolve this issue in a way that would be most efficient for Mr. Rongstad and for the attorneys involved in the deposition.

In addition, and this is a further reason why the stay will be granted—

MR. GARVEY: Denied you mean?

THE COURT: —I not only have to consider the question of the likelihood of success on the merits by the plaintiff, I have to also in the mix consider the harm that granting a stay would visit on the party opposing it. And here, the record that has been presented, not simply in the context of these proceedings but also in the context of a motion for a protective order that was sought and partially granted last week, is that the plaintiff when the allegedly libelous mailing was done was a candidate for public office and apparently was successful in winning an election that was the regular election held in November of last year.

The harm that she experienced certainly could not have been remedied in any way that would have any bearing whatsoever on her election of last fall. As a result, the urgency of her immediately filing a [19] lawsuit such as the one she has now filed was, as a practical matter, simply not there.

The affidavit that was submitted in reference to the motion for the protective order reveals she apparently is now considering running in a special election that in November of last year she would not have known was even going to take place, and it was only when a vacancy was created in I guess early January that that reality even became something worthy of her consideration.

Without commenting on the merits of her allegations that this mailing was in fact defamatory or that it was prompted by express malice, if she is going to seek to clear her name as best she is able in a manner that would have any value to her aspirations to seek the position where that opening has occurred, then it's crucial that that occur at some point prior to the point when that special election is held, and I don't know for sure when that will be. But in any event, delay would clearly be harmful to her legitimate interest in seeking to correct the harm done by the mailing that she alleges.

Now, a moment ago I may have misspoke and said this was an additional reason that the stay would be

* * * *

APPENDIX F

STATE OF WISCONSIN
CIRCUIT COURT, DANE COUNTY
BRANCH 13

Case No. 03-CV-0177
Code No. 30106
INTENTIONAL TORT

JULIE M. LASSA
1900 Clark Street
Stevens Point, WI 54481,

Plaintiff,

v.

TODD RONGSTAD, as president of VALKYERIE GROUP, LLC.
and as president of Alliance for a Working Wisconsin
108 W. 3rd St.
Waunakee, WI 53597,

THE VALKYRIE GROUP, LLC
108 W. 3rd St.
Waunakee, WI 53597,

A.M. MAILING SERVICES, INC.
100 Interstate Blvd.
Edgerton, WI 53534-9399,

and

DOES, 1-5, in their individual capacities,

Defendants.

AFFIDAVIT OF TODD RONGSTAD

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

TODD RONGSTAD, being first duly sworn under oath, deposes and states as follows:

1. That I am a board member and president of the Alliance for Working Wisconsin.

2. That in that position, I had numerous conversations with members of the association over the last several years and recently specifically related to the lawsuit at issue.

3. That as a board member and president of the association, I and the Alliance have previously guaranteed confidentiality with respect to the identity of members and have honored that throughout the course of my work with the Alliance.

4. That members have told me that if I am compelled to disclose the identity of members of the organization, that they will no longer be interested in participating in the organization or any such organization, for fear of public reprisal and potential legal action.

5. That disclosure of the names and the attendant loss of confidentiality will likely ruin my business and force me to find a new career.

Dated at Madison, Wisconsin this 5th day of February, 2003.

/s/ Todd Rongstad
TODD RONGSTAD

Subscribed to and sworn before me
this 5th day of February, 2003.

/s/ Michael P. Crooks
Notary Public, State of Wisconsin
My Commission expires: permanent

APPENDIX G

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

Case No. 03-CV-177
Case Code: 30106
Volume IV

JULIE M. LASSA,

Plaintiff,

v.

TODD RONGSTAD, THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC., and
DOES, 1-5, in their individual capacities,

Defendants.

DEPOSITION of TODD JAMES RONGSTAD, was taken under and pursuant to the provisions of Section 804.05 of the Wisconsin Statutes, and the acts amendatory thereof and supplementary thereto, before me, BRANDE WILSON, a Notary Public in and for the State of Wisconsin, at the law offices of Garvey & Stoddard, S.C., 634 West Main Street, Madison, Wisconsin, on the 11th day of February 2003, commencing at 8:12 o'clock in the forenoon.

* * * *

[33] Q And do you have any arrangements with any mailing house that they would pay you a percentage of the money?

A No.

Q You swore in your affidavit to the court that you, quote, "guaranteed confidentiality," unquote, and last week we asked you if you had a copy of that guarantee and have you had an opportunity to check your files?

A As I answered before, it's on the brochure for the Alliance for a Working Wisconsin.

Q There's nothing else other than the brochure that guaranteed the confidentiality?

A It's very explicit and that's something that anybody who would have contributed to the organization would have seen.

Q And does the brochure guarantee confidentiality with respect to the identity of members?

A Yes.

Q And their contributions?

A Yes, all supporters.

Q And you honor that throughout the course of your work at the Alliance?

A Yes.

[34] Q You indicated in your sworn affidavit that some members have contacted you concerning litigation, or potential litigation?

A I don't know if I said contacted. I've certainly had discussions with members about it.

Q Well, you swore that you would not release the names in part because of potential legal action against members; is that correct?

A Correct.

Q And has any member contacted you about this lawsuit?

A No.

Q And has any member contacted you about litigation in general?

A. No.

Q Are you being—is the Alliance for a Working Wisconsin, is it involved in any litigation other than this case?

A No.

Q Is The Valkyrie Group involved in any litigation?

A No.

Q Are you personally other than under the domestic matter that we discussed last time?

* * * *

APPENDIX H

[LOGO]

OFFICE OF THE CLERK
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Facsimile (608) 267-0640
Web Site: www.courts.state.wi.us

DISTRICT IV

March 4, 2003

To:

Edward R. Garvey
Garvey & Stoddard, S.C.
634 W. Main St., Ste. 101
Madison, WI 53703

Jon G. Furlow
Eric M. McLeod
Michael Best & Friedrich
P.O. Box 1806
Madison, WI 53701-1806

Michael P. Crooks
Peterson, Johnson & Murray, S.C.
131 West Wilson St. #200
Madison, WI 53703-2866

You are hereby notified that the Court has entered the following order:

03-0309-LV Julie M. Lassa v. Todd Rongstad, Valkyrie Group, LLC, A.M. Mailing Services, Inc., and Does 1-5

Before Vergeront P.J., Dykman and Roggensack, J.J.

On February 24, 2003, we denied Todd Rongstad's request for a stay pending disposition of his petition for leave to appeal. The time for Rongstad to submit argument on the merits of the petition for leave itself and the time for filing a

response has now elapsed without any filings by either party. Because it appears that Rongstad no longer wishes to seek interlocutory review of the circuit court's order,

IT IS ORDERED that the petition for leave to appeal is denied.

Cornelia G. Clark
Clerk of Court of Appeals

APPENDIX I

[LOGO]

OFFICE OF THE CLERK
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DISTRICT IV

April 1, 2003.

To:

Hon. Michael N. Nowakowski
City-County Bldg.
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703-3343

David J. Pliner
Corneille Law Group, LLC
700 Regent St., Ste. 201
Madison, WI 53715-2634

Judith A. Coleman, Circuit
Court Clerk
City-County Bldg., Rm. GR-10
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703-3341

Michael P. Crooks
Peterson, Johnson & Murray, S.C.
131 West Wilson St. #200
Madison, WI 53703-2866

Edward R. Garvey
Garvey & Stoddard, S.C.
634 W. Main St., Ste. 101
Madison, WI 53703

Eric M. McLeod
Jon G. Furlow
Michael, Best & Friedrich
P.O. Box 1806
Madison, WI 53701-1806

You are hereby notified that the Court has entered the following opinion and order:

03-0742-LV Julie Lassa v. Todd Rongstad, et al. (L.C. # 03 CV 177)

Before Dykman, Roggensack and Lundsten, JJ.

Todd Rongstad has filed a petition for leave to appeal and motion for temporary relief. He seeks review of two oral orders of the circuit court dated February 28 and March 11,

2003.[1] A petition for leave to appeal may only be taken from a judgment or order "entered" in the circuit court. WIS. STAT. RULE 809.50(1) (2001-02).[2] A judgment or order is "entered" when it is reduced to writing and filed with the clerk of the circuit court. *See* WIS. STAT. RULE 806.06(1) and 807.11. Leave to appeal may not be taken from oral orders of the circuit court.

Even if the orders had been reduced to writing, we would deny the petition for leave to appeal. We will only grant leave to appeal if the petitioner shows that immediate review by this court will: (1) materially advance the termination of the litigation or clarify further proceedings in the litigation; (2) protect the petitioner from substantial or irreparable injury; or (3) clarify an issue of general importance in the administration of justice. *See* WIS. STAT. § 808.03(2). Rongstad has not met these criteria.

Julie Lassa has moved for attorney's fees and costs. Because we cannot conclude that the petition has no reasonable basis in law or equity, we deny the motion. *See* WIS. STAT. RULE 809.25(3).

Upon the foregoing,

IT IS ORDERED that the motion for temporary relief is denied.

IT IS FURTHER ORDERED that the petition for leave to appeal is denied.

IT IS FURTHER ORDERED that the motion for attorney's fees and costs is denied.

Cornelia G. Clark
Clerk of Court of Appeals

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[1] The circuit court entered a written order on March 11, 2003, but that order is unrelated to the issues that Rongstad would like this court to review.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

APPENDIX J

[LOGO]

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DISTRICT IV

April 1, 2003

To:

Hon. Michael N. Nowakowski
City-County Bldg.
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703-3343

Michael P. Crooks
Peterson, Johnson & Murray, S.C.
131 West Wilson St. #200
Madison, WI 53703-2866

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Circuit Court Clerk
City-County Bldg., Rm. GR-10
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Michael, Best & Friedrich
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Madison, WI 53701-1806

Michael R. Bauer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

03-0743-W State of Wisconsin ex rel. *Todd Rongstad v. Circuit Court for Dane County and the Honorable Michael Nowakowski*, presiding (L.C. # 03-CV-177)

Before Dykman, J.

Todd Rongstad petitions for supervisory writ, seeking an order from this court compelling the circuit court to vacate its oral orders of February 28, 2003 and March 11, 2003. A petition for supervisory writ is available only when the duty of the circuit court is plain and its refusal to act within the line of such duty is clear. *State ex rel. Dressler v. Circuit Court,* 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991). Rongstad has not shown that the circuit court has a duty to vacate its orders.

Therefore,

IT IS ORDERED that the petition for supervisory writ is denied *ex parte.*

Cornelia G. Clark
Clerk of Court of Appeals

APPENDIX K

STATE OF WISCONSIN
CIRCUIT COURT, DANE COUNTY
Branch 13

Case No. 03-CV-177
CONTEMPT HEARING

JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD, THE VALKYRIE GROUP, LLC, and DOES 1-5, in their individual capacities,

Defendants.

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 28th day of February, 2003, commencing at 3:00 o'clock p.m.

PRESIDING:

HONORABLE MICHAEL N. NOWAKOWSKI
Circuit Judge

APPEARANCES:

The Plaintiff appeared in person, and by counsel EDWARD R. GARVEY and CHRISTA O. WESTERBERG, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin;

MICHAEL P. CROOKS and ANTHONY D. CONLIN, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants.

ALSO PRESENT:

ATTORNEY DAVID J. PLINER,
Corneille Law Group, LLC

* * * *

[27] MR. GARVEY: Okay. Thank you.

THE COURT: But we'll see you all back on the 11th at 1:15, and you can use that in the notice of motion that you serve on Mr. Rongstad on Monday.

MR. GARVEY: Thank you, your Honor.

MR. PLINER: Your Honor, if I can have just a minute or two?

THE COURT: Mr. Pliner wrote me a letter that I got today—I'm not sure if everyone else has received it—about his client's interest in this. And he and his client American Family, I think—

MR. PLINER: Yes.

THE COURT: Is that right—filed a motion accompanied by a brief. And, as a result, in order to give other people the same opportunity to respond with a brief, I set a briefing schedule, which is what I would ordinarily do. Mr. Pliner's letter today said we don't really need a briefing schedule and please have the hearing earlier. He also I think suggested in the letter that if people had an objection to his request for bifurcation and for stay, that they should let people know and let the Court know within five days.

So I guess we don't have to wait five days. We can find out if there's an objection. Mr. Crooks, [28] what's your client's position on this, since I take it your client is the insured?

MR. CROOKS: Yeah. I don't think he objects to a bifurcation and a stay, your Honor

THE COURT: Mr. Garvey?

MR. GARVEY: Perhaps I—frankly I've not handled—are they talking about a stay of the entire proceedings?

THE COURT: Oh, yes, other than the—whatever proceedings would be had in connection with the coverage dispute.

MR. GARVEY: Well, we would certainly object to any stays of the proceedings, but I'll give you a more formal answer within that five-day period.

MR. PLINER: Judge, I guess part of the motion was just intervention as well because American Family isn't part of the suit yet and that would be separate from the stay. I don't know if there's any objection to that.

MR. GARVEY: May I have just a minute?

THE COURT: Okay.

MR. CROOKS: Judge, we don't object to the intervention.

THE COURT: Let's see if we can get at least a half of a loaf here.

[29] MR. GARVEY: I had to consult a lawyer. Would this stay discovery?

THE COURT: Ordinarily.

MR. PLINER: What we had contemplated would be an intervention and then a stay of all proceedings on the merits pending resolution of the coverage, which I think would be resolved by a summary judgment motion.

MR. GARVEY: Well, no. We would certainly object to that.

THE COURT: All right. Well, let's simply proceed on the schedule that we presently had, and we'll deal with it at the time of the hearing that's now set for, whatever. I don't remember what the date any more is of that.

MR. PLINER: Can I ask for a clarification if there's an objection to our intervention in the case without a stay?

MR. GARVEY: We don't have any objection to your coming in.

THE COURT: I think Mr. Crooks earlier said he didn't.

MR. CROOKS: True.

THE COURT: That part of the motion will be granted, and you'll be permitted to intervene, and

* * * *